

No. 15390

United States
COURT OF APPEALS
for the Ninth Circuit

LOUIE HOY GAY,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

Appellee.

APPELLANT'S BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

FILED

APR - 3 1957

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*Appeal from the United States District Court for the
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JURISDICTIONAL STATEMENT

Appellant filed his complaint to be declared a national and/or citizen of the United States under the provisions of Sec. 503 of the Nationality Act of 1940 (Title 8 U.S.C.A. Sec. 903) in the United States District Court for the District of Oregon.

Following the trial of said cause, appellant's complaint was dismissed by order of District Judge Gus J. Solomon on October 4, 1956 (Tr. 20).

Notice of Appeal was duly filed with the Clerk of this Court (Tr. 21).

Jurisdiction of the District Court to entertain the complaint of appellant declaring him to be a national and/or citizen of the United States, is conferred by Sec. 503 of the Nationality Act of 1940, 54 Stat. 1171 (Title 8, U.S.C.A. Sec. 903) and Sec. 1343 of Title 28 U.S.C.A. Jurisdiction of the Court of Appeals to review the District Court's final order, is conferred by Sec. 128 of the Judicial Code as amended (28 U.S.C.A. 1291). The order of the District Court in dismissing the complaint of appellant for a judgment, declaring him to be a national and/or citizen of the United States, is a final decision within the meaning of Sec. 128 of the Judicial Code.

This case comes within the meaning and interpretation of Sec. 503 and we quote said section:

Judicial Proceedings for Declaration of United States Nationality in Event of Denial of Rights and Privileges as Nationals; Certificate of Indentity Pending Judgment.

"If any person who claims a right or privilege of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have initiated such an action

in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I Subchap. V, Sec. 503, 54 Stat. 1171."

STATEMENT OF THE CASE

Appellant originally filed his complaint through his father, Louie Foo in the District Court for the District of Oregon for a declaratory judgment under Section 503 of the Nationality Act of 1940 (heretofore quoted). Appellant's complaint was thereafter dismissed upon motion and subsequently appealed to this Court and, as a result of said appeal, this Court reversed and remanded the action to the District Court for the District of Oregon for trial. See *Louie Hoy Gay v. Dulles* 225 F. 2d 854.

Thereafter appellant filed an amended complaint (Tr. 3), upon which this cause was tried. The amended complaint contains all of the requisite allegations in this type of case and concludes with a prayer asking that appellant be adjudged a national and/or citizen of the United States.

Evidence was submitted to the Court by the appellant and appellee, and thereafter the Court rendered an opinion (Tr. 12) and Findings of Fact (Tr. 16) and Judgment dismissing appellant's complaint. (Tr. 20). This appeal results.

SPECIFICATIONS OF ERROR

Appellant respectfully contends that the District Court erred in:

1. Finding that appellant had failed to prove by a preponderance of the evidence that the appellant is the son of Louie Foo (Tr. 18).

2. Finding that appellant has failed to prove by a preponderance of the evidence that Louie Foo was a citizen of the United States by birth or naturalization (Tr. 18), and in failing to requiring appellee to rebut prima facie evidence of citizenship by substantial proof of fraud.

3. Admitting into evidence the Immigration file of appellant, being Exhibit No. 14 and that portion of Exhibit No. 7, being the testimony of Louie Hoy Gay and his mother, Ng Shee, taken in Hong Kong (Tr. 46, 100, 101, 102, 103, 106, 107, 111, 112 and 114).

4. Objections to Exhibit 14 and the above mentioned portions of Exhibit 7 were made on the grounds of their being incompetent, irrelevant and immaterial, testimony taken ex parte, and within the rule announced in *Wong Wing Foo v. McGrath*, 196 F. 2d 120, and *Lee Shew v. Brownell*, 219 F. 2d 301, being testimony taken of appellant, his father, Louie Foo, and appellant's mother, before the Immigration and Consular authorities in Hong Kong and in the U. S.

5. Finding that appellant has failed to establish his right to a declaration of United States citizenship pursuant to Sec. 1993, Revised Statutes of the United States.

6. Finding that judgment should be entered dismissing appellant's complaint for failure of proof of allegations of the complaint herein by a preponderance of the evidence.

7. Rendering a judgment that appellant's complaint be dismissed.

SUMMARY OF ARGUMENT

Two questions of fact are presented in this cause:

1. Has the relationship of father and son been established between the appellant, Louie Hoy Gay, and his father, Louie Foo, by a preponderance of the evidence?

2. Was Louie Foo a citizen of the United States at the time of the birth of Louie Hoy Gay and did his citizenship status continue up to the present?

Question 1:

Appellant has shown by a preponderance of the evidence that he is the legal and natural son of Louie Foo and appellee has offered no substantial proof to the contrary.

Question 2:

Louie Foo has shown by prima facie evidence and other evidence that he was a citizen of the United States upon the birth of his son and still is, and that he has a right to remain therein as a citizen.

Appellee did not plead or prove fraud in Louie Foo's claimed United States citizenship or his right to remain in the United States, and the Court erred in making findings that Louie Foo failed to prove by a preponderance of the evidence that he was a citizen. The burden of proof was upon appellee to show by substantial evidence that Louie Foo's claimed right of citizenship and right to remain in the United States were obtained by fraud. No pleading or evidence of fraud was offered by appellee to rebut the prima facie case of citizenship first made, nor was any finding made by the Court to that effect.

A question of law arises as to the admissibility of parts of Exhibit No. 7, being the State Department file on appellant, Louie Hoy Gay, the particular evidence objected to being the testimony of Louie Hoy Gay and his mother, Ng Shee, taken before the American Consul General in Hong Kong. This Court has held that this type of case should be tried de novo. *Wong Wing Foo v. McGrath* (CCA 9 1952), 196 F. 2d 120.

A question of law also arises as to the admissibility of the entire Immigration file on Louie Foo, being Exhibit 14. In *Lee Shew v. Brownell* (CCA 9), 219 F. 2d 301, the Court held that admissions of evidence of record in prior proceedings before the Immigration Service pertaining to admission to the United States is error.

The two questions of fact, having been proven affirmatively by a preponderance of the evidence, would, of necessity, result in a reversal of the Findings 5, 6 and 7 listed in the Specifications of Error.

ARGUMENT

Rule 52 (a) of Federal Rules of Civil Procedure precludes an appellate court from disturbing findings *unless* they are clearly erroneous. *Yip Mie Jork v. Dulles* (CCA 9), 237 F. 2d 383; *Takehara v. Dulles* (CCA 9), 205 F. 2d 560.

Question 1:

Has Relationship of Father and Son Been Established Between Appellant, Louie Hoy Gay, and His Father, Louie Foo?

Louie Foo testified that Louie Hoy Gay is his son (Tr. 37) and was born July 5, 1908 (Tr. 38); that he made a trip to China in 1907 (Tr. 35) and married his present wife, Ng Shee, in the same year (Tr. 36) and that Louie Hoy Gay was born as a result of this marriage (Tr. 37); that Louie Foo returned to China a second time in 1921 and lived in the same house with Louie Hoy Gay and his wife (Tr. 39), and had sent him

money from the time of his birth up to the time of his second visit to China in 1921 (Tr. 39); that a second child, a girl, was born to Louie Foo and his wife while he was in China on the second visit from 1921 to 1924, and after his return to the United States, he continued to send money to his family (Tr. 40); that Louie Foo has sent money to his wife and boy every few months thereafter (Tr. 109).

A letter from Louie Hoy Gay (Louie Hoy Kee) to Louie Foo, dated October 5, 1929, was introduced into evidence as Exhibit 9, which shows that Louie Hoy Gay asked for money from his father, Louie Foo (Tr. 53, 54). A letter from Louie Hoy Gay (Gar Jok, married name) Exhibit 10 (Tr. 53, 54). This letter reveals the fact that money was received by Louie Hoy Gay from his father, Louie Foo.

Louie Foo sent \$3,000.00 to his wife and family to repair his home (Tr. 55), Exhibit 11 being a letter from Ng Shee, to Louie Foo postmarked 1952. Louie Foo identified a photo of his son, Louie Hoy Gay, which he had in his possession for 16 or 18 years, being Exhibit 8 (Tr. 52).

Blood tests were made of Louie Hoy Gay in Hong Kong and of Louie Foo in Portland, Oregon and were found to be compatible (Tr. 28) and Exhibit 7.

Robert Schmeer, 84 years of age, former vice president of The United Stations National Bank, and now a member of Schmeer Insurance Agency (Tr. 58) testified he has known Louie Foo for 50 years and has seen him almost continuously since that time and that Louie

Foo mentioned to him on many occasions the fact of his having a wife and son in China.

Richard C. Kneeland, Certified Public Accountant for the last 25 years in Portland, Oregon, testified he had known Louie Foo for 25 years, prepared his income tax statements, and that Louie Foo told him he had a son over ten years ago.

Testimony clearly indicates that Louie Hoy Gay is the son of Louie Foo and all records introduced in evidence pertaining to the relationship indicate and always have indicated their relationship of father and son. Prima facie evidence was clearly established.

If the party having the burden of proof establishes a prima facie case, the burden is shifted to the adverse party, 31 C.J.S. 719. If no contradictory evidence is offered, unsupported allegations are not sufficient to overcome the prima facie showing. *Wong Kam Chong v. United States*, 111 F. 2d 707, 712; *Leong Kwai Yin v. United States*, 9 Circ., 31 F. 2d 738; *Fong Lum Kwai v. United States*, 9 Cir., 49 F. 2d 19; *Lee Choy v. United States*, 9 Cir., 49 F. 2d 24.

Even though the prima facie evidence is of a minimum quantity, it is strong enough to raise a presumption, when unrebutted to establish a fact. *Otis & Co. v. Securities and Exchange Commission*, 176 F 2d 34. The appellant has established his claimed relationship by a fair preponderance of the evidence. Once a prima facie claim of United States citizenship has been established, the burden of proving alienage rests upon the government. See *United States v. Todd*, 68 L. Ed. 221, 223.

Question 2:

Was Louie Foo a Citizen of the United States at the Time of the Birth of His Son and Did His Citizenship Status Continue up to the Present?

Louie Foo, now 73 years of age, testified that he was born in Portland, Oregon, on August 10, 1884 (Tr. 31) and has resided in Oregon ever since; that he now resides on a farm owned by him in Marion County; that he also owns real estate in Multnomah County, Oregon (Tr. 48). He conducted Chinese curio stores in Portland, Oregon, for many years in various locations therein, beginning in 1904 (Tr. 33). He made two trips to China, as outlined above. Louie Foo has always claimed American citizenship and has always held himself out as such with everyone he has come in contact with, including Immigration officials and the witnesses who testified for him at the trial, Mr. Schmeer and Mr. Kneeland, who have known him for many, many years.

Louie Foo was issued a passport by the United States Government as a citizen of the United States on April 3, 1952 (Tr. 43), Exhibit No. 2. Although a passport has been held not to be any evidence of citizenship, it seems odd to the writer that a passport would even be considered for Louie Foo, in view of the position here taken by the appellee, i.e., that Louie Foo never did submit evidence of his birth in connection with his applications for his two trips to China (Tr. 30). Would the State Department be so free in issuing a passport unless they believed that Louie Foo was a citizen of the United States as shown by the evidence in this case.

A decree of registration of birth of Louie Foo as a citizen of the United States was issued to him by the Circuit Court of the State of Oregon on February 8, 1945 (Tr. 43), Exhibit 3.

Section 432.255, Oregon Revised Statutes, provides:
 "Petition for certificate of unrecorded birth.

(1) Any person who is a resident of or who was born in this state and whose birth is not of record with the State Registrar or of public record in any state of the United States, may file a verified petition with the clerk of the circuit court of any county of this state setting forth as nearly as known to the petitioner:

- (a) The time and place of his birth.
- (b) The name and residence and birthplace of his father.
- (c) The name and residence and birthplace and maiden name of his mother.
- (d) That no public record of his birth exists."

Section 432.280 O.R.S. provides that a certified copy of such record shall be "prima facie" evidence in all courts and places of the facts stated therein. *Mah Toi v. Brownell* (CCA 9, 219 F. 2d 642:

"A birth certificate is prima facie evidence of birth requiring that substantial evidence rebutting the presumption be presented in court."

Section 432.265 provides:

"Prior to filing a petition under ORS 432.255 the petitioner shall serve upon the district attorney of the county wherein the petition is filed a copy of the petition and the district attorney shall accept service upon the original thereof."

The court, in his opinion (Tr. 14), states that neither the Secretary of State, nor the United States, nor any agency thereof, was a party to these proceedings and are not bound by this decree. The above stated provision of the Oregon law requiring that the petition shall be served on the District Attorney before it is filed is a prerequisite to a hearing of said petition, which was complied with herein.

Louie Foo was issued a certificate of identity No. 54325 as a merchant by the Immigration officials at Seattle, Washington, on November 30, 1924, upon his second return from China (Tr. 44), Exhibit 4. This certificate of identity entitles him to remain in the United States and is a prima facie right of the holder to remain in the United States. *Choy Yuen Chan v. United States* (CCA 9), 30 F. 2d 516:

“In the absence of a charge that an act had been committed which justifies his deportation, or some affirmative proof of the Government that he obtained admission fraudulently, the holder of such a certificate is entitled to remain in the United States.”

Leong Kwai Yin v. U. S., 31 F. 2d 738. Quoting from said certificate of identity:

“Certificate of identity issued to a Chinese person pursuant to rules of immigration is prima facie evidence of the holder to remain in the United States until overcome by proof that it was fraudulently obtained.”

In the case of *Fong Lum Kwai v. United States*, 49 F. 2d 19, CCA 9, Judge Wilburn, speaking for the court, said:

"In *Wong Yee Toon v. Stump*, 233 F. 194, 196, by the Circuit Court of Appeals of the Fourth Circuit, it is said: 'After the certificate (of identity) is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes as evidence that it should be annulled before an order for deportation is warranted.' This was cited with approval in our decision in *Lum Man Shing v. U. S.*, 29 F. (2d) 500, 502, where this court held that the certificate of identity issued under rule 20 of the Rules of Immigration, Department of Labor, to a Chinese person who had entered the Hawaiian Islands at Honolulu, was sufficient prima facie proof to establish the right of the holder to remain in the United States * * *

"There was no evidence in this record to overcome the presumption arising from the findings of the Board of Special Inquiry."

Yue Boo Ming v. United States, 103 F. 2d 355.

Louie Foo registered for the United States Army draft in both World Wars on September 12, 1918, and on April 26, 1942, respectively (Tr. 44), Exhibit 5.

Louie Foo was a registered voter in Multnomah County, Oregon, and voted from 1928 to 1941 (Tr. 47 and 72), Exhibit 12. This early record discloses that Louie Foo voted in a primary election on May 18, 1928, and in a general election on November 6, 1928.

Robert W. Schmeer, previously mentioned, testified that he has known Louie Foo for approximately 50 years almost continuously (Tr. 60); that he always paid back his loans from the bank "on the dot;" that he always claimed to be a United States citizen (Tr. 62 and 67).

Louie Foo has always claimed American citizenship by birth and Immigration authorities have known of this claim since his first visit to China in 1908 and have never denied his right to come and go, or his claims of citizenship, nor have they brought deportation proceedings against him since that time. Does it not seem that appellee is now estopped to deny his citizenship from the foregoing facts?

In the case of *Chin Wing Dong v. Clark*, 76 F. Supp. 648 (CCA 9), the Immigration Service was not satisfied whether a man was a citizen or not, hence no steps were taken to furnish him evidence that he was a citizen, or any steps taken toward deporting him as an alien. In passing the court said:

“From all such testimony, records and other exhibits, it was established that the petitioner had not only registered for and been inducted in the United States Army during the first World War as a citizen of the United States, but that he held himself out to be such a citizen and had been recognized as such by all with whom he came in contact, except on some occasions, by the Immigration and Naturalization Service, as previously related. For instance, he bought and held real property, paid taxes, registered as a voter and regularly cast his ballot in numerous elections. He established an excellent reputation as an honest law-abiding citizen. I am mindful that in effect the Department merely argues against granting him the affirmative relief of decree of citizenship, and that there has been no effort nor intention of deportation. In other words, it is implied that the petitioner may live here, exercise the rights of citizenship, and even vote, but that the Court should deny him a decree that he is the citizen that in fact he is. *To require him to continue in the legal twilight of such uncertainty is*

neither fair to him nor worthy of this Government."
(Italics ours.)

The evidence clearly identified appellant as the lawful son of Louie Foo and the evidence clearly identifies Loui Foo as a citizen of the United States since his birth in Portland, Oregon, up to and including the present time.

The appellant offered into evidence the State Department file (Exhibit No. 7) with the exception of the testimony contained therein of appellant and his mother, which was taken before the Immigration authorities in Hong Kong (Tr. 46).

Appellee introduced that part of Exhibit 7 containing the testimony of appellant and his mother taken in Hong Kong (Tr. 100) and was admitted by the Court (Tr. 103), and appellee was then permitted to question Louie Foo upon the testimony given by his wife, which was taken in Hong Kong. The Court again said he did not think this admissible but allowed the testimony (Tr. 107).

The Court admitted the immigration file of Louie Foo (Tr. 111, 112, 114) which was objected to by counsel for appellant (Tr. 112).

The Court stated, in his opinion (Tr. 15) that he considered plaintiff's (appellant's) statements referred to in the immigration file. The question concerning introduction of immigration records and the right to a trial de novo in citizenship proceedings has been ruled on by this Court in *Wong Wing Fu v. McGrath*, 196 F. 2d 120; *Lee Shew v. Brownell*, 219 F. 2d 201, and *Mah Yong Og*

v. Clark, 81 F. Supp. 696, 697. It has also been held that a document is not admissible to prove the facts, which it recites. See *United States v. International Harvester Co.*, 274 U.S. 693. This Court, in *Lee Choy v. United States*, 49 F. 2d at p. 27, concluded that improper introduction of certain immigration records was reversible error. The Court stated:

“It thus appears that the Court unconsciously allowed the erroneously admitted record to influence him in consideration of the case. This is a striking illustration of the danger of getting into the record evidence not admissible under well-recognized rules. If these records were controlling in the decision of the case, it would seem that the defendant should be discharged from custody. In judicial proceedings the court is restricted in the reception of evidence to only such as meets the requirements of legal proof.”

The evidence clearly identifies appellant as the lawful son of Louie Foo and the evidence clearly identifies Louie Foo as a citizen of the United States since his birth in Portland, Oregon, up to and including the present time.

CONCLUSION

It is submitted that the proceeding in the District Court was a trial de novo and not a review of the administrative hearing. The admission into evidence of the whole Immigration file and designated parts of the State Department file was incompetent and inadmissible evidence. Appellant not only established a prima facie case showing his claimed relationship with his father and that his father was a citizen of the United States, but

established these facts by substantial evidence. No competent evidence was offered by appellee to controvert this showing.

It is respectfully requested that the judgment of the lower court be reversed and that appellant be declared to be a United States citizen and/or national.

Dated at Portland, Oregon, March 26, 1957.

BANKS & BANKS,

By RODNEY A. BANKS,
Attorneys for Appellant.

